Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER,

Petitioner,

v.

ALLEGHENY AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Whether the judgment of the court of appeals is final so as to permit review by this Court.

Whether the court of appeals has deviated from well established principles of the doctrine of primary jurisdiction by deferring petitioner's tort claim until the agency statutorily charged with regulating the allegedly tortious activities has spoken on the permissibility of the activities.

STATUTES INVOLVED

Sections 102, 404(b), 411 and 1002(e) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1302, 1374(b), 1381, and 1482(e), provide:

Section 102. [49 U.S.C. § 1302.] In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue performance or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Section 404(b). [49 U.S.C. § 1374(b).] No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 411. [49 U.S.C. § 1381.] The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Section 1002(e). [49 U.S.C. § 1482(e).] In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

STATEMENT

A. The Facts

This action arises from petitioner Nader's failure to get a seat on Allegheny Airlines Flight 864 from Washington, D.C. to Hartford, Connecticut on April 28, 1972. Nader arrived at the gate sometime after 10:05 a.m. for the 10:15 a.m. flight (C.A. App.[1] 35-36) and learned that all of the seats were occupied by reservations-holding passengers. (C.A. App. 77-79.) Nader was denied boarding on the Allegheny flight because he arrived at the gate later than all of the other Washington passengers that the flight could accommodate. (*Id.*)

Despite the fact that he held a ticket and a reservation, Nader could not be boarded on Allegheny's flight because the flight had been "overbooked" pursuant to an industry-wide practice designed to ameliorate the harmful effects of late cancellations and "no-shows"—reservations-holding passengers who do not appear at flight time (hereinafter collectively referred to as "no-shows"). (C.A. App. 66-71, 152-205.)

[1] As in the Petition, "C.A. App." will be used to refer to the printed appendix in the court of appeals.

If airlines did not overbook—that is, accept more reservations for a flight than the flight's capacity—all flights would depart partially empty because of no-shows. (C.A. App. 66-71, 152-205.) Accordingly, airlines, including Allegheny, make statistical studies of the pattern of no-shows for each flight and accept a number of reservations in excess of the flight's capacity based on the number of no-shows that computer analysis of the flight indicates will occur. (C.A. App. 152-205.)

The purpose of Allegheny's statistical analysis of no-shows, and its consequent overbooking, is to insure that each of its flights will depart with as few empty seats as possible. (C.A. App. 124.) Despite close statistical studies of each flight, every one of which is analyzed periodically, Allegheny's fully-booked flights customarily depart with empty seats.

Occasionally, if actual no-shows for a flight deviate widely from the statistical pattern, more ticket-holding passengers will arrive for a flight than the flight can accommodate. Consequently, some passengers who have come to the airport with tickets will be denied boarding on the flight. Those passengers are called "oversales."

The Civil Aeronautics Board (hereinafter "CAB"), which regulates Allegheny pursuant to the Federal Aviation Act of 1958 (C.A. App. 6-7, 13), has examined extensively the airline industry's overbooking practices in a series of proceedings over many years. (App. A8-A14.)[2] The CAB views overbooking as within its regulatory authority (C.A. App. 152-205), and it has chosen not to ban overbooking but instead to require tender of denied boarding compensation on a reasonable scale to

[2] The term "App." will be used to refer to the Appendices to the Petition.

passengers oversold as a result of overbooking.[3] (C.A. App. 50-51.)

Moreover, the CAB in 1967 *considered and rejected* a proposed rule that would have required airlines to advise passengers that they could be denied boarding on overbooked flights. (C.A. App. 154-56, App. A10-A11.)[4] As a consequence of the court of appeals' decision below, the CAB is once again considering the matter of advice to passengers on the practice of overbooking. On July 11, 1975, the CAB announced in Order 75-7-54 that it was soliciting comments on how best to determine whether air carriers' information policies with respect to their overbooking practices have been unfair or deceptive. It further stated its intention in that Order to institute a new rulemaking proceeding to consider "the ticket oversale problem."

B. The Proceedings Below

After Nader was denied boarding on April 28, 1972, and after an unsuccessful attempt by his counsel to settle his claim against Allegheny by extracting a promise from the airline "that it would take immediate steps to eliminate overbooking and oversales" (C.A. App. 149), Nader brought suit against Allegheny in the United States District Court for the District of Columbia seeking, together with a co-plaintiff, $250,000 in compensatory and punitive damages. (C.A. App. 11-12.) He and his co-plaintiff Connecticut Citizen Action Group (hereinafter "CCAG"), a consumer group before whom he was scheduled to speak on the day of his abortive flight, claimed that Allegheny was liable to them under the antidiscrimination provision of the Federal Aviation Act of 1958, 49 U.S.C.

[3] Nader refused the denied boarding compensation offered to him by Allegheny. (C.A. App. 149.)

[4] It is the failure to give such advice that is the gravamen of petitioner's common law misrepresentation claim.

§ 1374(b) (1970) (text at p. 3, *supra*), and under common law tort principles of misrepresentation, for failing to disclose its overbooking practices.

After a trial to the court, Judge Charles Richey entered a judgment for Nader on both the discrimination and misrepresentation claims and awarded him $10 in compensatory damages and $25,000 in punitive damages. He also entered judgment for CCAG on its misrepresentation claim and awarded it $51 in compensatory damages and $25,000 in punitive damages. (App. B10-B11.)

On review by the United States Court of Appeals for the District of Columbia Circuit, in which Allegheny was supported by amicus briefs of the CAB and the Air Transport Association of America, that court reversed the district court and remanded the case for further proceedings.

With respect to the judgment for Nader on his claim of fraudulent misrepresentation,[5] the court of appeals reversed as clearly erroneous the district court's finding that Allegheny affirmatively misrepresented to Nader that he had a guaranteed reservation for a seat. (App. A26.) The court held that Nader had not proved Allegheny liable to him for the tort of misrepresentation; rather, the court found that Nader's claim, if any, was

[5] With respect to the district court's judgment for Nader on the antidiscrimination claim, the court of appeals held that the lower court made errors of law and clearly erroneous findings of fact, and it remanded that portion of the case with directions to make new findings of fact and conclusions of law and to reopen the record if necessary. (App. A14-A24, A49-A50.) Review is not sought by the petitioner of that portion of the court of appeals' judgment.

The court of appeals further held that co-plaintiff CCAG could not recover from Allegheny on its claim of misrepresentation because it was not within the class of persons whom Allegheny had reason to expect might act in reliance on its statements, and the court reversed the judgment for CCAG. (App. A40.) Review of that portion of the court of appeals' decision is likewise not sought by the Petition.

for nonrepresentation. (App. A25-A26.) The court held that before the district court considered that claim it must, pursuant to "an application of the principles of primary jurisdiction," stay its proceedings until the CAB had spoken, in a proceeding that the CAB is currently conducting, on the issue of whether Allegheny's alleged nondisclosure of its overbooking practices was "deceptive" or "unfair" within the provisions of § 411 of the Federal Aviation Act (49 U.S.C. § 1381, text at p. 3, *supra*). (App. A32, A37.) The court further held that the CAB's mandate to "effectively regulate the airline industry in the public interest" pursuant, *inter alia*, to 49 U.S.C. §§ 1302 and 1482(e) (1970) (text at pp. 2 and 3, *supra*) requires that if the agency finds Allegheny's overbooking practices not to be deceptive or unfair, then those practices as a matter of law cannot constitute common law misrepresentation. (App. A30.)

If, however, the CAB finds Allegheny's practices to have been deceptive or unfair, the court of appeals directed the district court to determine whether Nader could recover for Allegheny's alleged nonrepresentation. (App. A26, A37.) The court of appeals ruled that in any further district court proceedings Allegheny should not be held to a standard of full disclosure as a fiduciary, as the district court had erroneously decided. (App. A49.) The district court was also directed to consider, in determining whether punitive damages should be imposed in the event Nader was permitted to recover on his claim, whether Allegheny had a good faith defense to punitive damages by its reasonable belief at the time of the occurrence that its overbooking policies were lawful and approved by the CAB. (App. A48-49.)

ARGUMENT

I. The Judgment of the Court of Appeals Sought to be Reviewed is not Final, and There is no Compelling Reason for Premature Review.

As the preceding Statement demonstrates, the judgment of the court of appeals sought to be reviewed by the Petition is not final. The court of appeals' opinion calls for further proceedings that may entail the taking of additional evidence, both at the district court and at the CAB, before Nader's rights are finally determined. According to the standards for review applied by this Court, the court of appeals' interim judgment should not be reviewed and the Petition for a Writ of Certiorari should be denied.

An examination of the directions of the court of appeals on remand reveals the various proceedings yet to occur in this litigation. The outcomes of those proceedings might moot the issue that the Court is asked to review and render advisory any decision the Court might reach if it grants this Petition. The examination will also reveal that there are conflicting factual contentions that remain to be resolved, not only by the district court, but also by the CAB whose expertise the court of appeals has ordered should be brought to bear on the deceptiveness, *vel non*, of Allegheny's overbooking practices, the issue at the heart of the present dispute.

The district court was directed by the court of appeals to resolve three factual issues, by reopening the trial record, if necessary, on Nader's claim under the antidiscrimination provision of the Federal Aviation Act. The district court was asked to resolve: whether Allegheny's own operations manual properly established denied boarding priority rules, as it is required to do by CAB regulations; what those rules were and whether they were properly interpreted by Allegheny's agent;

and whether the agent's testimony was credible in light of certain documentary evidence. (App. A24.) While it might be contended that these factual issues do not bear directly on Nader's misrepresentation claim, they do go to the heart of Nader's claimed injury—his denied boarding. Resolution of the issues might also affect Allegheny's defense to the imposition of punitive damages on the misrepresentation claim that the district court was directed to consider, *i.e.*, whether Allegheny reasonably believed that its overbooking practices had been approved by the CAB. (App. A48-49.) Morover, the issues are certainly ones that an appellate court would want resolved before rendering a judgment on review.

A second reason for the unreviewability of the court of appeals' judgment is the nature of the stay imposed by the court on the proceedings below. The court of appeals, in an "application of the principles of primary jurisdiction" (App. A32), directed the district court to defer further proceedings on Nader's misrepresentation claim until the CAB had spoken on the issue of whether Allegheny's failure affirmatively to disclose its overbooking practices was deceptive or unfair. (App. A50.) After noting that the CAB in 1967 had ruled that airlines *need not disclose* the overbooked condition of their flights to prospective passengers (App. A10),[6] the court found that the CAB was again considering the fairness and reasonableness of airlines' overbooking practices, that an administrative law judge had initially found the overbooking practices not to be deceptive, and that this decision was on review by the full CAB. (App. A33-A37.)

[6] The CAB had found that such disclosure would be contrary to the public interest in that it (1) would create anxiety and confusion on the part of the traveling public, (2) would cause travelers to make a great number of duplicative and protective reservations, (3) would produce a rapid turnover of reservations within 24 hours before the departure of a flight, (4) would increase the no-show problem. (App. A10.)

It has been pointed out *supra* at p. 6 that the CAB is now in the process of insuring that the issue raised in this litigation will be specifically considered in the Board's proceedings.

In asking the district court to await the CAB's decision on the deceptiveness *vel non* of Allegheny's overbooking practices before continuing its own proceedings, the court of appeals was honoring the primary jurisdiction doctrine, which holds that "a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements." 3 K. Davis, Administrative Law Treatise, § 19.01 at 5 (1958). By granting the instant Petition, which seeks a ruling on the relationship between the courts and the CAB on the matter of airlines' overbooking practices, *before* the CAB has definitively spoken on those practices and *before* the district court has considered the CAB's expertise, the Court would be ignoring the doctrine of primary jurisdiction and would, perforce, be violating the doctrine of finality of judgments, which will be discussed more fully below.

A third reason for the unreviewability of the court of appeals' judgment is that the outcomes of further proceedings before the CAB and the district court contemplated by the court of appeals' decision may moot the issue for which review is sought by the Petition and, consequently, render advisory any opinion that the Court might reach if it granted the Petition. If the CAB concludes in its current proceeding, in which it will specifically consider the issue identified by the court of appeals, that Allegheny's overbooking practices are deceptive or unfair, then the district court will litigate Nader's common law tort claim (App. A49), and the

petitioner's contention that the CAB "may retroactively immunize common law frauds from civil liability" will be mooted. Similarly, if the CAB holds that its 1967 ruling permitting nondisclosure of an overbooked condition was dispositive of the matter, as has been suggested by comments in response to the Board's Order 75-7-54 (*e.g.*, Comments of American Airlines, Inc. (August 8, 1975), Emergency Reservations Practices Investigation, C.A.B. Docket 26253, at 5, 7-8), then petitioner's "retroactive immunization" argument will likewise be mooted. It would be contrary to the principles of appellate review consistently applied by this Court to rule on the legality of potential CAB activity—"the immunization" of a common law tort—when that activity might not take place. Rather, the teachings of the doctrine of finality of judgments are that this Court should wait until a full record is made and all proceedings are at an end before engaging in appellate review.

The rule that ". . . except in extraordinary cases, the writ [of certiorari] is not issued until final decree" has been honored for all of this Court's history. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The rule's rationale is to prevent this Court from engaging in piecemeal proceedings and from rendering opinions which, because the litigation is not final, ". . . might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation." *Pope* v. *Atl. Coast Line Ry. Co.*, 345 U.S. 379, 382 (1953).

The test for "finality" of judgments has generally been whether there remains further litigation after the rendition of the judgment. If there is "nothing more to litigate" and all that remains is for the lower court to enter judgment as directed by the appellate court, then the judgment is final and reviewable by this Court. *Chicago & Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77, 83

(1958). If, however, there is a remand that directs further litigation at the trial court level, then certiorari is denied. *Bhd. of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Ry. Co.*, 389 U.S. 327 (1967); *Slaker* v. *O'Connor*, 278 U.S. 188 (1929).

In the instant case, not only has the court of appeals directed further litigation on unresolved factual issues, from which further appeals would lie, but the administrative proceedings to which the district court was directed to show deference have yet to be completed. When the administrative proceedings are complete they may moot entirely the issue that the Court is being asked to review. Furthermore, the Petition mentions no extraordinary reasons for disregarding the doctrine of finality and granting premature review. Accordingly, the Petition for Writ of Certiorari should be denied as seeking review of a judgment that is not final.

II. The Decision Below was Correct and Did Not Deviate From Well Established Principles of Primary Jurisdiction.

Far from being without precedent as the petitioner intimates (Petition at 18-19), the ruling of the court of appeals that Allegheny's policies may be immune from private damage actions if found by the CAB to be necessary to its regulatory scheme is consistent with well established principles of primary jurisdiction.[7]

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[7] Contrary to the tenor of the Petition, the court of appeals did not take away the right of "bumped" airline passengers to seek damages in court. It reaffirmed the denied boarding cause of action pursuant to 49 U.S.C. § 1374(b) (1970) (App. A14-A15), which has been characterized as "more generous" than the common law (*Mason* v. *Pan American World Airways, Inc.*, 13 Av. L. Rep. 17,114, 17,117 (D.D.C. 1974)), but denied the novel application of the tort of fraudulent misrepresentation to a "bumping" cause of action.

Petitioner argues that there is no precedent for the court of appeals' holding that Allegheny's overbooking practices may not as a matter of law constitute fraudulent misrepresentation if found by the CAB not to be deceptive or unfair pursuant to § 411 of the Federal Aviation Act. However, Petitioner does not, because he cannot, contend that the CAB is without power prospectively to immunize airlines from private actions that are inconsistent with the regulatory scheme. Notwithstanding § 1106 of the Federal Aviation Act (text of Petition, p. 3) preserving common law remedies, a contention that the CAB may not prospectively immunize is untenable in view of *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and its progeny, and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

In the *Abilene Cotton Oil Co.* case, specifically relied on below by the court of appeals (App. A31), this Court held that the existence of a common law rights preservation clause in the Interstate Commerce Act virtually identical to the clause invoked by petitioner was not an impediment to the barring of common law actions challenging rates that had been approved by the Interstate Commerce Commission. *Id.* at 446-47. Petitioner's attempt to distinguish *Abilene Cotton Oil Co.* (Petition at 19 n.22) as a case involving the reasonableness of rates, as contrasted to the instant case which the court of appeals found involves practices having "a significant rate making effect" (App. A30), must fail. The rationale of the *Abilene Cotton Oil Co.* case, quoted below, is as persuasive for actions challenging practices having "a significant rate making effect" as for actions challenging rates themselves:

> For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. [*Id.* at 440-41.]

Similarly, this Court in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973), held, as petitioner concedes (Petition at 18), that the CAB could immunize the actions of airlines from private antitrust claims. Agency immunization has been clearly reaffirmed recently by this Court in *United States* v. *National Association of Securities Dealers*, 95 S. Ct. 2427 (1975).

The question, then, is whether the law has permitted regulatory agencies to do retroactively what they indisputably can do prospectively.[8] The answer to that question must be yes in order to avoid the anomaly described by this Court when it held, in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), that the CAB could *retroactively immunize* activity within its § 411 jurisdiction—the same section that is invoked in the instant case—from the antitrust laws. In dismissing a suit against regulated airlines and others charging that their activities prior to the 1938 adoption of the Civil Aeronautics Act violated the anti-

[8] Respondent does not concede that eventual CAB action will necessarily operate retroactively. As pointed out *supra* at pp. 11-12 the CAB might hold that in approving Allegheny's over-booking practices it is not doing so retroactively, but is merely reaffirming its approval of the practices, including nondisclosure, that it gave in 1967.

trust laws, this Court held that the CAB, and not the courts, should retroactively approve or condemn the challenged practices:

> It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the "public interest" as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. [*Id.* at 309.]

Manifestly, it would likewise be "strange" and "odd" if overbooking practices found by the CAB to be within its regulatory scheme, lawful, and in the public interest were held to subject the airlines to damages in common law actions.

If a regulatory agency has the power within its implementing statute to approve certain practices of the industry it regulates, as the CAB without question does with respect to airlines' overbooking practices (App. A5-A14), this Court has held that the courts must defer to such agency approval and resultant immunity even if the alleged injury caused by the challenged practices occurred *before* the practices had been submitted to the agency for approval. *Far East Conf.* v. *United States*, 342 U.S. 570 (1952); *U. S. Nav. Co., Inc.* v. *Cunard S.S. Co., Inc.*, 284 U.S. 474, 486-87 (1932). Such deferral must *a fortiori* occur if the challenged practices, as has arguably occurred in the instant case, have been referred to the agency for consideration, but the agency has not yet ruled. *Laveson* v. *Trans World Airlines*, 471 F.2d 76, 81 (3d Cir. 1972).

Turning finally to petitioner's argument (Petition at 14-18) that deferral to the CAB is improper because his claim is a "private dispute" seeking damages, that issue, too, has well-reasoned precedent supporting the court of

appeals' decision.[9] In *Laveson* v. *Trans World Airlines*, *supra*, a "private dispute" between a passenger and an airline, the plaintiffs argued as does petitioner here that because their suit was solely for antitrust law treble damages, which the CAB has no power to award, the deferral to the agency for its possible immunization of the challenged activities was improper. The court rejected that argument, quoting from the rationale of *S.S.W., Inc.* v. *Air Transport Association of America*, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952):

> The fact remains that, regardless of the particular remedy sought, the subject matter of this action falls within the regulatory jurisdiction of the CAB. If courts fail to apply the primary jurisdiction doctrine in suits for damages, "we might [still] have the [spectacle] of courts throughout the country enjoining practices as violations of the antitrust laws even though the agency specifically authorized to deal with them has determined *or may decide*, subject to judicial review, that such practices serve the interests of the national air transportation policy. [*Laveson* v. *Trans World Airlines*, *supra*, at 83 (emphasis added).]

The same "private action" argument against deferral to the CAB was rejected in *Price* v. *Trans World Airlines, Inc.*, 481 F.2d 844, 848 (9th Cir. 1973).

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[9] The argument of the Petition at p. 16 n.17, that the rationale of the court of appeals' decision would likely have untoward effects on the operation of agencies like the Federal Trade Commission and the Securities and Exchange Commission is answered by the court of appeals at App. A28-A30 and by this Court in *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79 (1956). The need for uniformity of rates and practices in highly regulated industries like airlines and interstate motor carriers may compel a different application of the doctrine of primary jurisdiction than in "purely private business enterprises" (*id.* at 83) over which agencies like the FTC and the SEC have limited regulatory powers.

CONCLUSION

The Petition should be denied because it seeks review of a judgment that is not final and that contemplates further proceedings, both before the CAB and the district court, which may moot the issue raised by the Petition. Moreover, the judgment of the court of appeals is correct and follows well established principles of the doctrine of primary jurisdiction. Finally, petitioner has failed to show any conflict between the circuits or other factors that would warrant review of the decision below. Accordingly, this Court should deny the Petition for Certiorari.

Respectfully submitted,

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